UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAMAR JOHNSON, Plaintiff, v. PAUL A. QUANDER, Director, and MICHAEL JOHNSON, Community Supervision Officer, Court Services and Offender Supervision Agency, Defendants.	))))))))))))))	Civil Action No. 04-448 (RBW) ECF

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER

Introduction

Plaintiff Lamar Johnson was convicted in District of Columbia Superior Court of two counts of unarmed robbery in December, 2001, and was sentenced to two years of probation. Complaint, ¶ 10. His term of probation was initially scheduled to end on March 14, 2004. Id. ¶ 10. Plaintiff brings this action to prevent the Court Services and Offender Supervision Agency for the District of Columbia ("CSOSA")[1] from compelling him to provide a sample of his deoxyribonucleic acid (commonly known as "DNA") as required by the DNA Analysis Backlog Elimination Act of 2000, 42 U.S.C. § 14135b ("DNA Act"), and the District of Columbia's implementation of that law, D.C. Code § 22-4151. Plaintiff characterizes his suit as a "civil rights action" involving alleged violations of 42 U.S.C. § 1983. Id. ¶¶ 2, 3. In addition, plaintiff

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[1] Plaintiff has identified as defendants the head of CSOSA and the Community Supervision Officer assigned to his case. Both are named exclusively in their individual capacities. CSOSA is a federal agency and accordingly is represented in this action by the Office of the United States Attorney. See D.C. Code § 24-1233(a).

asserts claims under the Fourth, Fifth, and Sixth Amendments to the United States Constitution, as well as violations specifically of the equal protection and *ex post facto* clauses, the Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, 110 Stat. 1936 ("HIPPA"), and the International Convention of the Elimination of all Forms of Racial Discrimination.

Along with his complaint, plaintiff filed a motion requesting a temporary restraining order "prohibiting Defendants from . . . forcibly seizing and searching Plaintiff's bodily fluids, tissue, or other biological materials for law enforcement purposes . . [and] "refrain[ing] from any retaliation against Plaintiff for the exercise of his constitutional and statutory rights by bringing this action." Pl.'s Motion, at 1-2. Importantly plaintiff grounds his request for a temporary restraining order entirely on his assertion that compelling him to provide a sample of his DNA as a condition of his probation would violate his Fourth Amendment right to be free from unreasonable searches and seizures. See Mem. In Support of Pl.'s Motion for Temporary Restraining Order ("Pl.'s Mem."), at 3 & n.2.[2] As shown by the experience in other states -- the majority of which have DNA collection statutes similar to the District of Columbia's and which were passed under the auspices of an earlier federal DNA law-- it is defendants, not plaintiff, who are likely to succeed on the merits. Because plaintiff cannot show that he is likely to

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[2] Notwithstanding plaintiff's reliance exclusively on the Fourth Amendment, his brief includes factual and legal assertions related to his alternative claims. For example, plaintiff includes argument concerning his belief that he is being treated differently than other probationers and speculation that CSOSA "[is] not yet regularly enforcing the DNA Act to others and [has] not created a workable scheme for doing so." Pl.'s Mem. at 28-29. These arguments are immaterial to the analysis under the Fourth Amendment and defendants, therefore, do not address them at length at this time. However, as the attached Declaration of Thomas Williams demonstrates, CSOSA has been collecting DNA samples since 2000 and has collected more than 3,500 such samples.

succeed on the merits of that claim, particularly because nearly every federal Circuit Court of Appeals in this country to have considered the identical claim has rejected it, the Court should deny his request for preliminary injunctive relief.[3] Moreover, the harm attendant to allowing plaintiff to withhold a DNA sample while he litigates this matter and the public interest in enforcing the laws both favor denying plaintiff the relief he seeks.

Preliminary Statement

Particularly when considering plaintiff's preliminary request, the Court should be mindful that plaintiff is scheduled to appear in the Superior Court for the District of Columbia at a hearing on April 9, 2004 to show cause why his probation should not be revoked based upon his failure to provide a DNA sample. See Complaint, Exhibit B. Accordingly, this case implicates ongoing criminal proceedings in the Superior Court for the District of Columbia.[4]

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[3] Although plaintiff makes several references throughout his brief to the Military DNA Act, 10 U.S.C. § 1565, he fails to note that a case alleging its unconstitutionality as a violation of, among other things, the Fourth Amendment, is now pending before this Court in Tootle v. Secretary of Defense, Civil Action No. 03-1014 (JDB). As of the filing of this memorandum, Defendant's Motion to Dismiss or, In the Alternative, For Summary Judgment in Tootle is ripe for disposition by the Honorable John D. Bates. Because Tootle challenges the portion of the DNA Act which requires the military to collect DNA from soldiers convicted of military crimes and to forward the DNA to the FBI for inclusion in the national database, Tootle presents issues similar to the instant case. Importantly, plaintiff's subsequent reference on page 22 of his brief to the military's use of DNA samples taken from soldiers for the purpose of identifying their remains is entirely different. That provision is contained in the 2003 National Defense Authorization Act ("2003 NDAA"), and it overrides the Pentagon's policy that the DNA samples be used almost exclusively for identification of troops killed in combat. The 2003 NDAA allows the military to provide access to the repository for law enforcement purposes only with a court order and in connection with an investigation or prosecution of a felony or any sexual offense for which no other source DNA information is reasonably available. See 10 U.S.C. § 1565a.

[4] Federal courts have the power to refrain from hearing cases that would interfere with a pending state criminal proceeding. See Younger v. Harris, 401 U.S. 37, 43-44 (1971). This rule would seem to apply with equal force to the District of Columbia. In this regard, counsel for defendants are not aware of any cases in which the courts for the District of Columbia have addressed the DNA Act or D.C. Code § 22-2801.

Plaintiff's lawsuit in this Court is equivalent to a tactical first strike at establishing a defense to what he anticipates will be the government's argument that his probation should be revoked based on his failure to comply fully with all of the terms of his probation. Plaintiff, of course, will have every opportunity to argue in the Superior Court that the DNA Act and the D.C. Code provision violate his constitutional rights. Plaintiff's ability to raise the same arguments he is raising here in the Superior Court and the D.C. Court of Appeals provides him with adequate relief. See Juluke v. Hodel, 811 F.2d 1553, 1556-57 (D.C. Cir. 1987) (reviewing the notions of comity between federal and state courts underlying Younger abstention and noting that even where abstention is not appropriate, equitable considerations might lead a court to defer action in a civil proceeding pending resolution of related criminal proceedings).

Apart from his ongoing probation proceedings, however, the D.C. Circuit's decision in Juluke suggests that the Court may properly entertain plaintiff's separate request for relief with regard to his possible *future* arrest for violation of the law requiring him to provide a DNA sample. Juluke, 811 F.2d at 1557, citing Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) (holding that an injunction could issue in favor of two owners of topless bars who had not been prosecuted for violating a local ordinance). In fact, defendants respectfully submit that the current impasse is subject to a ready compromise. Having subjected himself voluntarily to the jurisdiction of this Court, the government suggests that the Court require plaintiff to provide a blood sample immediately either to CSOSA or some entity designated by the Court to be retained while the Court ultimately resolves whether it should be returned to plaintiff or provided to CSOSA for genetic screening and inclusion in the Combined DNA Index System ("CODIS")

maintained by the Federal Bureau of Investigation at the conclusion of this case. Without the *res*, the Court may not be able to grant full and final relief in this case. Plaintiff will not be harmed, irreparably or otherwise, by simply providing the blood sample because his arguments concern the use of the sample and not the physical collection of it. Undersigned counsel has been informed that the District of Columbia Pretrial Services Agency, an independent part of CSOSA, has indicated that it has appropriate facilities to ensure chain of custody and store a blood sample while this case is pending if the Court elects to pursue this avenue.

ARGUMENT

I. Standard of Review

The decision whether to grant preliminary injunctive relief under Federal Rule of Civil Procedure 65(a) is reserved to the sound discretion of the Court. A temporary restraining order is an extraordinary remedy intended to protect a party from imminent irreparable harm by maintaining the *status quo* until a full hearing can be held on the merits. Fed. R. Civ. P. 65; see Granny Goose, Inc. v. Teamsters, 415 U.S. 423, 439 (1973). A preliminary injunction is similar in nature but longer in duration.

It is well-settled that plaintiff cannot simply allege that they face imminent harm and expect a TRO to be entered. To the contrary:

> A [TRO] may be granted only when the plaintiff demonstrates (1) a substantial likelihood of success on the merits, (2) that irreparable injury will result in the absence of the requested relief, (3) that no other parties will be harmed if temporary relief is granted, and (4) that the public interest favors entry of a temporary restraining order.

The Nation Magazine v. Department of State, 805 F. Supp. 68, 72 (D.D.C. 1992) (citation omitted) (emphasis added); see also Barrow v. Graham, 124 F. Supp. 2d 714, 716 (D.D.C. 2000) ("the Court must still consider the traditional four-part test for injunctive relief"). Preliminary

injunctive relief is an extraordinary remedy, and the party seeking it has a substantial burden of proof. American Coastal Line Joint Venture v. United States Lines, Inc., 580 F. Supp. 932, 935 (D.D.C. 1983); see Sea Containers Ltd. v. Stena AB, 890 F.2d 1205, 1208 (D.C. Cir. 1989); Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958). "The basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." Wisconsin Gas Co., 758 F.2d at 674. To constitute irreparable harm, "the injury must be both certain and great; it must be actual and not theoretical." Id.

In this Circuit a "substantial indication"of likely success on the merits is a *sine qua non* of preliminary injunctive relief. Absent such a substantial indication, "there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review." American Bankers Ass'n v. National Credit Union Admin., 38 F. Supp.2d 114, 141 (D.D.C. 1999), quoting WMATA v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). Applying this standard in this case plainly reveals that plaintiff is not entitled to preliminary injunctive relief. Not only has he failed to demonstrate a substantial likelihood of success on the merits, but he has also failed to show the existence of any genuine irreparable harm or that the public's interest in the effectiveness of the criminal justice system favors granting his extraordinary request. Consequently, for the reasons outlined below, his application should be denied.

II. Plaintiff Cannot Demonstrate Any Likelihood of Success on the Merits Because The DNA Act, 42 U.S.C. § 14135b, is Constitutional

Plaintiff's sole claim that the DNA Act and the D.C. Code provision implementing it violate his Fourth Amendment rights is without merit. It is well settled that the involuntary taking of a DNA sample under the provisions of the DNA Act is a search and seizure under the

Fourth Amendment. See, e.g., Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989); Schmerber v. California, 384 U.S. 757 (1966). Under the Fourth Amendment, searches and seizures must be reasonable, and ordinarily, a search and seizure without individualized suspicion of wrong-doing is deemed unreasonable. City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000) (citations omitted). However, in United States v. Knights, 534 U.S. 112 (2001), the Supreme Court held that laws implicating probationers' Fourth Amendment rights are designed to serve law enforcement goals and need not satisfy the Warrant Clause, but rather, will be upheld if they are reasonable under the totality of the circumstances. The Supreme Court has also held that a suspicionless search with a law enforcement objective is not presumptively unconstitutional. Illinois v. Lidster, ___ U.S. ___, 124 S. Ct. 885, 890 (U.S. 2004)(holding highway checkpoint to obtain information from motorists about a hit-and-run accident is a special circumstance permitting a suspicionless search). If the primary purpose is beyond the normal need for law enforcement, the Court must balance the private and the governmental interest. Skinner, 489 U.S. at 619. "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." Id. at 624.

Although there is no binding precedent, this issue does not arise on a blank slate. Plaintiff's perfunctory acknowledgment in a footnote that authority contrary to his position that the DNA Act violates the Fourth Amendment exists skips over a wealth of other persuasive authorities. See Pl.'s Mem. at 21 n.27. In fact, the vast majority of courts addressing the constitutionality of earlier incarnations of the federal DNA law, as well as the state statutes similar to or broader than the D.C. Code provision at issue here, have upheld the statutes as valid

exceptions to the Fourth Amendment's requirement for individualized suspicion of wrongdoing prior to executing a warrantless search. Although there is currently a potential for a split of authority involving the Ninth Circuit, most Circuit courts have found that the collection of DNA samples from convicted felons pursuant to similar statutes does not violate the Fourth Amendment. See United States v. Kimler, 335 F.3d 1132 (10th Cir. 2003)(finding DNA collection statute to be reasonable search under "special needs" exception because desire to build a DNA database goes beyond the ordinary law enforcement need.); Velasquez v. Woods, 329 F. 3d 420 (5th Cir. 2003) (per curiam); Roe v. Marcotte, 193 F.3d 72 (2d Cir. 1999); Shaffer v. Saffle, 248 F.3d 1180, (10th Cir. 1998); United States v. Plotts, 347 F.3d 873, 877 (10th Cir. 2003); Rise v. Oregon 59 F. 3d 1556 (9th Cir 1995); Jones v. Murray, 962 F.2d 302, 307 (4th Cir. 1992) (holding that Virginia DNA statute was constitutional as applied to violent as well as nonviolent convicted felons but not analyzing under the "special needs" framework because it found that incarcerated inmates were a special category); Green v. Berge, 354 F.3d 675, 676-79 (7th Cir. 2004); see also United States v. Kincade, 345 F.3d 1095 (9th Cir. 2003) (overruling Rise and finding no "special needs" exception because DNA database is ordinary law enforcement purpose), vacated by, rehearing *en banc*, granted by United States v. Kincade, 2004 U.S. App. LEXIS 15 (9th Cir. Jan. 5, 2004). Lower federal courts have also upheld these laws. See Vore v. United States Department of Justice, 281 F.Supp.2d 1129 (D. Ariz. 2003)("desire to build a DNA database goes beyond the ordinary law enforcement need"); United States v. Stegman, 295 F.Supp.2d 542, 548-50 (D. Md. 2003); Miller v. United States Parole Commission, 259 F.Supp.2d 1166 (D. Kan. 2003)(DNA collection statute falls within "special needs" exception because it is not targeted at investigating a particular individual or a specific crime); United States v. Sczubelek, 255 F.Supp.2d 315 (D. Del. 2003)(special needs exception applied to the DNA Act as

the search was designed to serve non-law enforcement ends, namely the creation of a national DNA database, and not to identify specific wrongdoers.); Nicholas v. Goord; 2003 U.S. Dist. LEXIS 1621 (S.D.N.Y. 2003)(primary purpose of DNA data bank not an ordinary law enforcement purpose because used to solve future crimes, not to investigate specific past crimes); United States v. Reynard, 220 F. Supp. 2d 1142 (S.D. Cal. 2002)(primary purpose to fill the CODIS database and ultimate purpose to create a more accurate criminal justice system and solve future crimes not an ordinary law enforcement purpose); Groceman v. United States Department of Justice, 2002 U.S. Dist. LEXIS 11491 (N.D. Tex. 2002)(DNA collection statute constitutional under traditional Fourth Amendment "balancing test").[5] Therefore, because the particular law challenged by plaintiff only filled in the gaps of earlier laws applicable to the states and those statutes have been found to be constitutional, plaintiff is not likely to succeed in a challenge to the DNA Act.

Attempting to turn back the tide of these cases, plaintiff relies primarily on a faulty argument constructed on a trilogy of recent cases from the Supreme Court: Edmond, 531 U.S. 32 (2000), Ferguson v. City of Charleston, 532 U.S. 67 (2001), and Illionois v. Lidster, ___ U.S. ___, 124 S. Ct. 885 (2004). Pl.'s Mem. at 20-23. Edmond invalidated a highway checkpoint program for the interdiction of narcotics as serving only an ordinary law enforcement purpose. Ferguson invalidated a state hospital program that tested pregnant women for illegal drug use as an ordinary law enforcement purpose. Significantly, Ferguson also refined the "special needs" doctrine used to analyze whether a suspicionless search is reasonable under the Fourth Amendment. Lidster held: (1) that brief stops of all motorists at a highway checkpoint seeking

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[5] At least one state courts has upheld the constitutionality of a state statute requiring DNA samples. E.g., In the Matter of D.L.C., 124 S.W.3d 354, 369-73 (Tex. Ct. App. 2003).

information on a recent hit-and-run accident on the highway was reasonable and did not violate the Fourth Amendment; and (2) that the stop of a driver for driving under the influence at the same checkpoint was constitutional.

The DNA Act is significantly different than the unconstitutional programs at issue in Edmond and Ferguson, which refused to uphold government drug testing programs under the special needs doctrine because they were for law enforcement purposes. In Edmond and Ferguson, the programs collected evidence of specific crimes that particular individuals were suspected of committing in the past. Unlike a urine test for illegal substances and contrary to plaintiff's vehement assertions, a DNA sample is not, in and of itself, conclusive evidence of a crime. Vore, 281 F.Supp.2d at 1135, citing Sczubelek, 255 F. Supp. 2d at 322. The DNA Act "creates a database for solving crimes that have not yet occurred or crimes that have occurred but are not specifically being looked at when taking any one individual's blood sample." Id. (citing Miller, 259 F. Supp. 2d at 1176.) Even if the information may "ultimately be used for law enforcement purposes," the collection of DNA from all qualifying prisoners is applied in a uniform, non-discretionary manner and is therefore more likely to pass Fourth Amendment muster. Reynard, 220 F.Supp.2d at 1165 (citing National Treasury Employees Union v. Von Raab, 489 U.S. 656, 667, 672 n. 2 (1989)).

While not overruling Indianapolis v. Edmonds, 531 U.S. 32 (2000), the Supreme Court has broadened the scope of the "special needs" exception. To determine whether a special circumstance making a suspicionless search reasonable exists, the Court looks to "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." Lidster, 124 S. Ct. at 890, citing Brown v. Texas, 443 U.S. 47, 51, (1979). Application of these factors to this case

demonstrate that the DNA Act and the D.C. Code provision call for a reasonable search. The objectives of the DNA Act (completing the CODIS database, improving the accuracy of convictions in the criminal justice system, discouraging recidivism, and solving future crimes) are all grave issues of public concern. It is undisputed that the DNA Act significantly advances these governmental interests and promotes a better criminal justice system. Plaintiff's strenuous arguments concerning the impact of DNA evidence at criminal trials appear to concede this point. The evidentiary issues associated with the trial are not for this Court to resolve. Most importantly for purposes of this case, the DNA Act and the D.C. Code provision advance these important governmental interests with only a minimal intrusion on the privacy rights the Fourth Amendment seeks to protect. The taking of blood by a trained technician from a probationer (who could, lest it be forgotten, have been imprisoned and subject to mandatory DNA collection), who is informed ahead of time that the blood will be drawn, is a minimal intrusion, especially given a probationer's reduced expectation of privacy while on probation.

The Ninth Circuit's decision in Rise v. Oregon, 59 F.3d 1556 (9th Cir. 1995), cert. denied, 517 U.S. 1160 (1996), is instructive on a point unrelated to its "special needs" analysis (which is flawed in light of Edmond and Ferguson). In Rise, the court found that the Oregon DNA law intruded on Fourth Amendment interests in only a "minimal" way, citing Supreme Court decisions that have characterized a blood test as an intrusion that is "not significant," Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 625 (1989), not "unduly extensive," Winston v. Lee, 470 U.S. 753, 762 (1985), "commonplace," Schmerber v. California, 384 U.S. 757, 771 (1966), and "routine," Breithaupt v. Abram, 352 U.S. 432, 436 (1957). The Ninth Circuit reasoned that this minimal intrusion was visited upon only a discrete subset of individuals -- in

that case convicted murderers and sex offenders -- whose reasonable expectation of privacy is diminished by virtue of their criminal acts. In that vein, the court specifically held that

> [o]nce a person is convicted of one of the felonies included as predicate offenses under [the Oregon law], his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from the blood sampling.

Rise, 59 F.3d at 1560. The Ninth Circuit drew an apt analogy to the fingerprinting context, where law enforcement cannot compel "free persons" to provide fingerprints in the absence of a warrant or some level of suspicion, but may lawfully "routinely require even the merely accused to provide fingerprint identification[.]" Id. at 1559-60. The Ninth Circuit found the "constitutionally significant distinction" drawn in fingerprint cases "even more compelling" with respect to the DNA requirement, which applies not to "free persons or even mere arrestees, but only to convicted felons." Id. at 1560.

In this case, plaintiff appears to argue that the D.C. provision is overly broad because it applies by its terms to more types of offenses than the earliest DNA statutes which generally included murderers and sex offenders. As evidenced by the chart attached to Plaintiff's Memorandum, many states now require DNA samples to be taken from all individuals convicted of any felony, and even if all felonies are not included, robbery offenses oftentimes are covered. There is no question that plaintiff was convicted of two felonies involving robbery. The court in Green upheld Wisconsin's state statute which also requires DNA from all convicted felons. Green, 354 F.3d at 678-79. Because plaintiff is without any authority to the contrary, plaintiff is unlikely to succeed on his argument that D.C.'s provision is overly broad as applied to individuals convicted of robbery.

Another of plaintiff's arguments is that there is no element to consent in the DNA Act which plaintiff describes as "an aspect that Justice Kennedy has recently described [in his opinion concurring in part in Ferguson, 532 U.S. at 90-91] as an 'essential, distinguishing feature' of a permissible suspicionless search." Pl.'s Mem. at 25. From this, plaintiff contends:

> This case is therefore very different from a case in which the person being searched has at least impliedly consented by voluntarily engaging in some regulated activity or profession, which he or she could have chosen to forego rather than undergo the search.

Id. This argument stretches the bounds of credulity. By its nature, crime (in plaintiff's case unarmed robbery) is precisely an activity which is regulated by law enforcement and which plaintiff could obviously have chosen to forego. Therefore, his consent to a search via his DNA may be implied as equally as if he were a railroad conductor instead of a convicted criminal. Plaintiff's suggestion that law enforcement should be contented to accept DNA samples voluntarily provided by probationers does not warrant a serious response. See id. at 25-26. Few convicted criminals, defendants submit, would voluntarily provide DNA samples and nothing about the DNA Act or the D.C. Code provision prevents such individuals from providing DNA samples for testing in support of his or her innocence.

Most of plaintiff's remaining arguments concern the possible future dangers inherent in the development of science and its potential use on his DNA. Because the uses of the DNA are strictly limited by law to law enforcement, such speculations, while entertaining on the big screen, provide no support for plaintiff's current position. Interestingly, plaintiff simultaneously argues that the DNA database is demographically skewed against minorities based on the higher likelihood that Blacks will be supervised than Whites, and predicts that growth of the database will be exponential as more people, including candidates for political office and members of the

judiciary will be required to provide DNA samples in the future. Pl.'s Mem. at 15, 20, 23. Another similarly overly dramatic assertion of plaintiff's is that: "these suspicionless searches create a grave risk of wrongful conviction for a small number of random people." Pl.'s Mem. at 23. Even putting aside the substantial scientific and evidentiary issues associated with such a broad statement which courts in individual cases will resolve, plaintiff conveniently overlooks the fact that the people subject to this requirement are not random at all. They have self-identified themselves to society as convicted criminals with the concomitant diminution of any legitimate expectation of privacy.[6]

Hence, regardless of the Court's application of the "special needs" doctrine, plaintiffs severely reduced expectation of privacy renders his DNA testing constitutional under the Fourth Amendment.

III. The Other Factors Weigh Heavily Against Granting the Injunctive Relief Sought

A. Plaintiff Has Not Shown Irreparable Harm

To be entitled to the extraordinary relief of an order from a federal court which could potentially interfere with the Superior Court's oversight of plaintiff's probation during the pendency of this lawsuit, plaintiff must demonstrate that he is being irreparably harmed. Beacon Theatres v. Westover, 359 U.S. 500, 506-07 (1959); see also Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975). Plaintiff asserts that he may be incarcerated if his probation is revoked and

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[6] In addition, defendants simply note that plaintiff has provided no evidence that CSOSA's "enforcement [of the law requiring DNA samples] is not consistent." Pl.'s Mem. at 26. Even the Declaration of Todd A. Cox (which is arguably improperly submitted because a lawyer cannot act as a witness in the same proceeding in which he is counsel) demonstrates nothing more than familiarity with plaintiff's circumstances, and reveals that Mr. Cox has not made any inquiry regarding how many DNA samples CSOSA has obtained from probationers. Accordingly, plaintiff's unsupported and irresponsible argument should be entirely disregarded. See also Declaration of Thomas Williams.

that a separate provision of the DNA Act would then subject him to collection of a sample of his DNA. Pl.'s Mem. at 27. There is an appreciable difference between a sanction for disobeying the direct order of his CSO and the mere risk of an adverse consequence stemming from a voluntary choice. With regard to this distinction, it is important to recall that plaintiff had no right to be placed on probation in the first place and the Superior Court's exercise of discretion in this area both in the past and at the present deserves consideration.

Moreover, as the Declaration of Michael Johnson makes clear, CSOSA has already recommended in favor of revoking plaintiff's probation twice in connection with plaintiff's positive drug tests results and his failures to comply with drug treatment and counseling, to participate in a mental health day treatment program, and to report for drug testing and office visits. Thus, although it appears from the record that the instant refusal to provide DNA is the primary basis for possible revocation, plaintiff cannot show that it would be the exclusive grounds. Plaintiff's admission that he violated the orders of his CSO by refusing to come to the officer's office daily until his probation was scheduled to expire (or until he provided a blood sample) is telling. While the exercise of his constitutional rights is certainly appropriate, plaintiff's secondary plea that he be relieved of the "retaliatory" reporting requirement because it imposes a hardship on him is distinct.[7] In any event, the *status quo* is that plaintiff is not currently subject to a daily reporting requirement. See Johnson Dec., ¶ 15. Accordingly, there is no need for the Court to issue any preliminary injunctive order.

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[7] There should be no concern that the temporary daily reporting requirement interfered with plaintiff's employment. Although plaintiff has represented in the introductory paragraph of his memorandum that he "has held a steady job, " defendants note that plaintiff's sworn statement in his application for leave to proceed *in forma pauperis* indicates that he is not presently employed.

Most of the harm plaintiff alleges he will suffer is speculative at this point. It is possible that plaintiff's probation will be terminated without his being required to provide a DNA sample even if the Superior Court finds that the law is constitutional. The other sources of harm plaintiff alleges are not imminent. As noted above, plaintiff claims that he could be harmed at some unknown point in the future when scientists may be able to glean information from his DNA which today's technology is unable to assess. Pl.'s Mem. at 10, 12. He also asserts that his DNA sample might one day be used as evidence against him and foreclose a conviction based on faulty evidence. Pl.'s Mem. at 13-15. Third, he claims that "the tragic consequences of flawed forensic DNA practice are inordinately visited upon minority communities." Pl.'s Mem. at 15-16. None of this is imminent or relevant to the claim of immediate and irreparable harm to plaintiff.

Notably, as defendants noted in the Preliminary Statement above, plaintiff is not objecting to the DNA collection on any physical or emotional grounds which would render the process itself problematic. Thus, it would appear that the simple solution to his request for injunctive relief would be for the Court to order plaintiff to allow his blood to be drawn by some entity, perhaps the Pretrial Services Agency, which would retain it without performing any tests or genetic screening on it until after the case is resolved. Then, if plaintiff prevails, the unanalyzed blood sample could be returned to plaintiff. On the other hand, if the government wins, then plaintiff's blood would be handled in the normal course and his genetic material would be included in the FBI's database known as CODIS.[8]

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[8] Because plaintiff's probation is within the jurisdiction of the Superior Court, it is not possible here, as was done in the Miles case where Mr. Miles was under a term of supervised release overseen by the federal court, to continue the term of plaintiff's probation.

B. The Balance of Harms Favors Ordering Plaintiff to Submit a DNA Sample Whose Ultimate Custody Can Await the Outcome of this Case

The final two factors of the test for emergency injunctive relief weigh against granting the extraordinary relief sought by the plaintiff. Those factors are the harm to the government and the public interest. The public interest at stake in this matter is closely aligned with the government's interest in ensuring the accurate prosecution of crimes, past and future. The public interest is sufficiently important to justify a minimal intrusion on plaintiff who is a member of a class of individuals with diminished privacy rights. The legislative history of the DNA Backlog Analysis Elimination Act of 2000 demonstrates that the purpose was to fill the gap of federal and military offenders in the national CODIS database. 146 Cong. Rec. S11654-02, at S11647. Congress intended the DNA legislation generally to serve multiple purposes, including facilitating accurate prosecutions and deterring recidivism. See Vore, 281 F.Supp.2d at 1135 (citing 146 Cong. Rec. S11645-02, at S11645-46). Beyond the immediate purpose of completing the database, the DNA Act contributes to the creation of a more accurate criminal justice system and assists law enforcement agencies in solving future crimes. Reynard, 220 F.Supp.2d at 1168.

The blood draw, while more intrusive than the taking of a fingerprint, is nonetheless a minimal intrusion when conducted by trained professionals in a controlled environment. Skinner, 489 U.S. at 625; Schmerber, 384 U.S. at 771. Balanced against this minimal private interest is the DNA Act's important governmental interest in completing the CODIS database, improving the accuracy of convictions in the criminal justice system, discouraging recidivism, and solving future crimes.

Conclusion

For the foregoing reasons, defendants respectfully request this Court deny plaintiff's application for either a temporary restraining order or preliminary injunctive relief.

Dated: March 29, 2004.

Respectfully submitted,

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